No. 88-1752

Supreme Court, U.S.
FILED
MAY 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

STATE OF SOUTH CAROLINA, et al.,

v. *Petitioners,*

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

DON B. MILLER
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JAY BENDER
BELSER, BAKER, BARWICK, RAVENEL & BENDER
1730 Main Street
Columbia, SC 29202
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

RICHARD STEELE
113 W. Main Street
Union, SC 29379
(803) 427-5237

Attorneys for Respondent Catawba Tribe

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986), this Court held that the 1959 Catawba Division of Assets Act required application of the South Carolina statute of limitations to the Catawba Tribe's land claims. Because the Court of Appeals had not reached the state law issue, this Court remanded the case. The question presented is:

Whether the Court of Appeals erred in its application of the South Carolina statute of limitations to the Tribe's federal claims to treaty lands when it ruled that the Tribe's claim is barred only against those persons who had adversely possessed property for 10 years after July 1, 1962 and before October 20, 1980, without tacking except by inheritance.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. Nature of the Case 1

II. Prior Proceedings and the Issues For Review... 2

REASONS FOR DENYING THE WRIT 4

I. The Court Of Appeals Followed This Court's Mandate And Correctly Decided The State Law Issue 4

A. Petitioners' Assertion that the Court of Appeals Disregarded This Court's Mandate and Failed to Rely on State Law is Incorrect: Their Claim that the Court of Appeals was Determined to Disregard This Court's Mandate is Unwarranted... 4

B. The Court Of Appeals Correctly Decided the State Law Issue: While South Carolina's 10-Year Statute does not Permit Tacking, the State's Policies of Stability and Repose are Satisfied by an Overall Limitations Scheme that Includes a 20-Year Presumption of Grant and 40-Year Statute of Repose Under Both of which Tacking is Permitted 12

TABLE OF CONTENTS – Continued

Page

1. *Because the Tribe's Claim was Filed Before the 20-Year Common Law Presumption of Grant Became Applicable (18 Years After the Statute of Limitations Began to Run), Only Those Defendants Who Can Prove 10 Years' Adverse Possession Without Tacking May Prevail Against the Tribe..* 12

2. *Predecessors of the South Carolina Supreme Court Have Recognized Both Indian Title and a Reservation Granted by the Crown to be Enforceable at Law and Superior to Subsequent Grants from the State: No South Carolina Cases Hold that "Legal Title" is Restricted to "Record Title"* 17

II. The Court Of Appeals Correctly Held That Under Federal Law, Indian Title Is Legal Title 22

III. Review At This Time Would Be Premature: The Complaint Has Not Been Answered And A Defendant Class Has Not Been Certified 26

IV. Petitioners' Exaggerated Fears Of Hardship Resulting From The Lower Court's Ruling Are Unfounded Because Congress Will Certainly Resolve This Claim If It Proceeds To The Merits 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Adams v. Adams, 220 S.C. 131, 66 S.E.2d 809 (1951) 16

Adams v. Chaplin, 10 S.C. (1 Hill) Eq. 265 (1833) 25

Beecher v. Wetherby, 95 U.S. 517 (1877) 24

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 11

Burnett v. Crawford, 50 S.C. 161, 27 S.E. 645 (1897) 16

Buttz v. Northern Pacific Railroad Co., 119 U.S. 55 (1886) 24

Catawba Indian Tribe v. State of South Carolina, 718 F.2d 1291 (4th Cir. 1983)..... 2

Catawba Indian Tribe v. State of South Carolina, 740 F.2d 305 (4th Cir. 1984)..... 27

Catawba Indian Tribe v. State of South Carolina, 865 F.2d 1444 (4th Cir. 1989)..... 3, 6, 9, 11, 20

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 24

Chisolm v. Caines, 67 F. 285 (1894) 19

Crotwell v. Whitney, 229 S.C. 213, 92 S.E.2d 473 (1956) 16

Delleney v. Winnsboro Granite Co., 72 S.C. 39, 51 S.E. 531 (1905) 21

Ellen v. Ellen, 16 S.C. 132 (1881)..... 16

Epperson v. Stansill, 64 S.C. 485, 42 S.E. 426 (1902) 16

TABLE OF AUTHORITIES – Continued

Page

First Carolina Joint Stock Land Bank v. Hudgens, 171 S.C. 18, 171 S.E. 449 (1933) 21

Garrett v. Weinberg, 48 S.C. 28, 26 S.E. 3 (1896) 16

Gregg v. Moore, 226 S.C. 366, 85 S.E.2d 279 (1954) 16

Haithcock v. Haithcock, 123 S.C. 61, 115 S.E. 727 (1923) 16, 20

Hawkins' Devisees v. Arthur, 2 S.C.L. (2 Bay) 195 (1798) 5, 18, 20

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) 23, 26

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) 27

Lewis v. Pope, 86 S.C. 285, 68 S.E. 680 (1910) 16

Love v. Turner, 71 S.C. 322, 51 S.E. 101 (1905) 16

Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835) 22, 23

Moore v. McClure, 4 S.C.L. 139 (1807) 19

Narragansett Tribe of Indians v. So. R.I. Land Devel. Corp., 418 F. Supp. 798 (D.R.I. 1976) 27

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 22, 23

Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 22, 24, 27

Pembaur v. Cincinnati, 475 U.S. 469 (1986) 11, 21

Propper v. Clark, 337 U.S. 472 (1949) 11, 22

TABLE OF AUTHORITIES – Continued

Page

Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D.Conn. 1976) 27

Scott v. Woodard, 2 McCord 161 (S.C. 1822)..... 21

Shoshone Tribe v. United States, 299 U.S. 476 (1937) 23

Sioux Tribe v. United States, 316 U.S. 317 (1942) 23

Skillern's Ex'rs v. May's Ex'rs, 10 U.S. (6 Cranch) 267 (1810)..... 11

South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986)..... 2, 4, 7, 8, 13

State Ex Rel. McLeod v. Sloan Const. Co., 284 S.C. 491, 328 S.E.2d 84 (S.C. App. 1985) 19

State v. Pacific Guano Company, 22 S.C. 50 (1884) 19

Stokes v. Murray, 102 S.C. 395, 87 S.E. 71 (1915) 16

Sutton v. Clark, 59 S.C. 440, 38 S.E. 150 (1901) 16, 21, 25

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) 23

The Tungus v. Skovgaard, 358 U.S. 588 (1959)..... 21

Thomas v. Daniel, 13 S.C.L. (2 McCord) 354 (1823) 5, 17, 20

United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946) 22

United States v. Durham Lumber Co., 363 U.S. 522 (1960) 22

United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941)..... 24

TABLE OF AUTHORITIES – Continued

Page

United States v. Shoshone Tribe, 304 U.S. 111 (1938) 22

Wisconsin v. Hitchcock, 201 U.S. 202 (1906) 24

STATUTES

25 U.S.C. §§ 931-938, Catawba Tribe of South Carolina Division of Assets Act 2

25 U.S.C. § 1701, Rhode Island Indian Claims Settlement Act of 1978 27

25 U.S.C. § 1721, Maine Indian Claims Settlement Act of 1980 27

25 U.S.C. § 1751, Connecticut Indian Land Claims Settlement Act 27

28 U.S.C. § 1331 5

28 U.S.C. § 1337 5

28 U.S.C. § 1361 5

S.C. Code Ann. § 15-3-340 ..... 12, 16

S.C. Code Ann. § 15-67-210 ..... 5, 12, 13, 17, 20, 21

S.C. Code Ann. § 27-15-10 17

S.C. Code Ann. § 27-15-30 ..... 17, 20

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-1453, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. Code Cong. & Ad. News 1948 27

Hearings on H.R. 3274, Hse. Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. (1979) 28

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 96-1353, 96th Cong., 2d Sess. *reprinted in* 1980 U.S. Code Cong. & Ad. News 3786 27

Hearings on H.R. 5494, Hse. Comm. on Interior and Insular Affairs, 97th Cong., 2d Sess. (1982) 28

S. Rep. No. 98-222, 98th Cong., 1st Sess..... 27

OTHER AUTHORITIES

D. Means, *Survey of Property Law,* 10 S.C.L.Q. 90 (Fall 1958)..... 15

F. Cohen, *Handbook of Federal Indian Law,* (1982 ed.) 23, 24, 25, 26

Note, *Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statute of Limitation, Presumption of a Grant, and Prescriptive Right in South Carolina,* 10 S.C.L.Q. 292 (Winter 1958)..... 15

STATEMENT OF THE CASE

I. Nature of the Case

In 1760 and 1763, the British Crown entered into treaties with the Catawba Indian Tribe under which the Tribe ceded vast portions of its aboriginal territory in return for the Crown's guarantee of protection for a 15-mile-square, 144,000-acre reservation. In 1840 the State of South Carolina, without the knowledge, consent, or participation of the United States, negotiated a "sale" of the Catawba Reservation, promising it would purchase a new reservation elsewhere for the Tribe. South Carolina took possession of the Treaty Reservation but failed to acquire a new reservation for the Tribe. In 1842, after the Tribe had wandered homeless for almost three years, the State bought back a 630-acre tract of the original Reservation as a "new" reservation for the Tribe. Today, the Tribe continues to occupy this tract, and the State continues to hold it in trust for the Tribe's benefit.

In 1980, after more than a century of unsuccessful efforts to resolve its claim legislatively and administratively, the Tribe filed suit seeking the return of its Treaty Reservation. The Tribe seeks a declaration that in 1763 it acquired a protected, recognized property right through its treaties with Great Britain and that since the adoption of the United States Constitution, its reservation lands have been protected by federal law. As a result, the 1840 "treaty" between the State and the Tribe is void, and the subject lands retain to this day their status as Indian tribal lands.

II. Prior Proceedings and the Issues For Review

The District Court postponed class certification and filing of answers in favor of first considering petitioners' motion for summary judgment based solely on the effects of the 1959 Catawba Tribe of South Carolina Division of Assets Act, 25 U.S.C. §§ 931-938 (1982) ("1959 Act"). The District Court granted summary judgment for petitioners, finding that the 1959 Act made state statutes of limitations applicable to the claim and that, as a result, the Tribe's claim was completely barred. (A. 49). On appeal, the Court of Appeals reversed the District Court but did not reach the question whether the South Carolina statute of limitations barred the claim because, in its view, state statutes of limitations did not apply to the claim [1] This Court granted certiorari to review a single issue – petitioners' "contention that, even if the Tribe's claim was valid before passage and enactment of the [1959] Act, § 5 of the Act made the state statute of limitations applicable to the claim." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 500 (1986) (A. 57). This Court reversed the Court of Appeals and held that the 1959 Act did result in the application of the state statute of limitations to the Tribe's claim. Because the Court of Appeals had not reviewed the District Court's ruling that the Tribe's claim was barred by the South Carolina statute of limitations, this Court remanded the case to the Court of Appeals for consideration of the state law issue.

---

[1] The Court of Appeals also held that the 1959 Act did not extinguish the Tribe's existence, did not ratify the 1840 Treaty, and did not terminate the federal trust relationship under the Nonintercourse Act. Catawba Indian Tribe of South Carolina v. State of South Carolina, 718 F.2d 1291, 1300 (4th Cir. 1983).

On remand, the parties filed supplemental briefs and oral argument was held before an *en banc* court on December 8, 1986. On August 4, 1987, the Court of Appeals certified the state law questions to the Supreme Court of South Carolina. On September 9, 1987, the South Carolina Supreme Court declined to answer the questions certified. The Court of Appeals then ordered additional briefing by the parties on the state law issues, after which a second oral argument before an *en banc* court was held in April, 1988.

On January, 23, 1989, the Court of Appeals held that because of South Carolina's "anti-tacking" rule, the state statute of limitations bars the Tribe's claim only against those possessors of land who can demonstrate that they or a predecessor had possessed the land adversely for 10 years after July 1, 1962 (the effective date of the 1959 Act), and before October 20, 1980 (the date this suit was filed). The 10 years must be continuous, *i.e.*, they cannot be arrived at by tacking successive periods of adverse possession, except in the case of inheritance.[2] The state statute of limitations does not bar the Tribe's claim against other persons. *Catawba Indian Tribe v. State of South Carolina*, 865 F.2d 1444, 1456 (4th Cir. 1989) (A.26).[3]

---

[2] As explained *infra* in part B.1., South Carolina has three limitations periods applicable to land claims: 10, 20 and 40 years. Only the shortest (10 year) statute prohibits tacking of successive periods of possession.

[3] The Court of Appeals also ruled, in response to a jurisdictional argument raised by the dissent, that the Tribe's claims

(Continued on following page)

The issue for review is whether the Fourth Circuit correctly applied the South Carolina statute of limitations to the Catawba Tribe's federal law claims.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Followed This Court's Mandate And Correctly Decided The State Law Issue.

A. Petitioners' Assertion that the Court of Appeals Disregarded This Court's Mandate and Failed to Rely on State Law is Incorrect: Their Claim that the Court of Appeals was Determined to Disregard This Court's Mandate is Unwarranted.

Petitioners argue that "[t]he linchpin of the [Court of Appeals'] ultimate holding was its conclusion that policies embodied in *federal* law required that Indian title be considered the same as legal title," (Pet. 10) (emphasis in original), and that the decision below was therefore based on federal law rather than on state law as mandated by

---

(Continued from previous page)

arise under federal law. In finding federal cause of action jurisdiction, the Court of Appeals relied on this Court's earlier holding in this case that the status of the Tribe's claim remained unchanged by enactment of the 1959 Act. In South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986), this Court applied the rule that "federal claims are subject to state statutes of limitations unless there is a federal statute of limitation or a conflict with federal policy." *Id.* at 507 (A.65) (footnote omitted). This Court's application of this rule suggests that the Court did consider whether the Tribe's claims continue to arise under federal law, as does the Court's holding that the status of the claim remained unchanged after the 1959 Act.

this Court.[4] This argument grossly distorts the Court of Appeals' decision and is based upon misquotation and misrepresentation of dictum as holding. Contrary to petitioners' characterization, the decision below rests exclusively on South Carolina law.

The Court of Appeals' discussion of the key state law issue, *i.e.*, whether Indian title is legal title under South Carolina law, is contained in parts III and IV of the opinion below. In part III, the Court of Appeals considered whether "legal title" under S.C. Code Ann. § 15-67-210 (Law. Co-op. 1976) is restricted to "record title." The court's rejection of petitioners' argument is based on its construction of state statutes and application of the precedents established in five decisions of the South Carolina Supreme Court or its predecessors.[5] While

---

[4] Petitioners apparently do not dispute that the Tribe's claims are federal law claims, as they make no mention in their petition of either the dissent's argument that the federal courts have no jurisdiction over the Tribe's claim because they are no longer federal claims or the majority's holding that the Tribe's claims are federal law claims. Rather petitioners state that "[j]urisdiction in the district court was asserted pursuant to 28 U.S.C. §§ 1331, 1337, and 1361." (Pet. 4).

[5] The oldest of these South Carolina cases held that the title established by a reservation by the Crown was superior under state law to title acquired through a subsequent grant by the state evidenced by regular deeds and conveyances. Hawkins' Devisees v. Arthur, 2 S.C.L. (2 Bay) 195 (1798). In another case, the Constitutional Court of South Carolina recognized Indian title as a legally enforceable estate under state law that was superior to title acquired through a subsequent grant from the state, holding that a state attempt to grant unextinguished Indian title was void. Thomas v. Daniel, 13 S.C.L. (2 McCord) 354 (1823).

part III contains an introductory recitation of the incidents of Indian title, the holding in part III rests entirely on the Court of Appeals' analysis of state law: "we conclude that based on its precedents the Supreme Court of South Carolina would hold that the Tribe's claim to legal title . . . is not defeated by lack of recording. . . ." *Catawba Indian Tribe v. State of South Carolina*, 865 F.2d at 1449-50 (A. 11).

Likewise, the holding in part IV of the Court of Appeals' decision rests entirely on state law. In part IV, the court addressed petitioners' argument that because Indian title cannot be alienated except by act of Congress, it is equitable title rather than legal title. The court first considered the nature of Indian title under federal law and concluded that under federal law Indian title is legal title. *Id.* at 1451 (A. 15). It then held without further discussion of state law, that:

> [W]e have no doubt that the Supreme Court of South Carolina, taking cognizance of the federal precedents and its own precedents, would hold that section 15-67-210 entitles the tribe to the presumption of possession.

Id. at 1451-52 (A. 15). The "federal precedents" referred to are those discussed by the Court of Appeals in part IV of its discussion and the phrase "its own precedents" refers to the state law cases discussed by the Court of Appeals in part III.[6]

---

[6] The remainder of the Court of Appeals' analysis of the operation of the state statute of limitations, contained in parts II, V and VI of the opinion, discusses only state law.

Part IV also contains a brief discussion of the Tribe's argument that serious Supremacy Clause and Equal Protection Clause issues would be raised if a state were to denominate Indian title as equitable when under federal law it is a legal title, and then rely on that denomination to defeat the federal policies embodied in the Nonintercourse Act. But this discussion is dictum: the Court of Appeals did not reach these constitutional issues because of its confidence that the South Carolina Supreme Court would follow its precedents and those of federal law.

This dictum, however, is the basis for petitioners' attempt to manufacture an issue worthy of review by this Court. Although the Court of Appeals applied the state statute in a manner that will probably bar the major part of the Tribe's claims, petitioners incorrectly assert that the court "concluded that the statute of limitations should not apply to the respondent's claims because of the federal policy to protect Indian tribes in the rightful occupancy of their lands."[7] (Pet. 9). Elsewhere, petitioners

---

[7] Petitioners also suggest that the Court of Appeals erred in treating the Tribe like an Indian tribe, implying that such treatment runs afoul of this Court's mandate. (Pet. 10-11). This Court's mandate, however, concerned application of the state statute of limitations, not whether respondent is to be treated as a tribe. Indeed, this Court "assume[d] that the respondent is the successor in interest of the Catawba Indian Tribe of South Carolina," *South Carolina v. Catawba Indian Tribe*, 476 U.S. at 500, n.2 (A.57), and did not review the Court of Appeals' holding that the 1959 Act did not extinguish the Tribe's existence. *See* note 1, *supra*.

build on that misstatement to contend that the Court of Appeals had a "determination to avoid the mandate of this Court" (Pet. 16) and a "determination *not* to apply the state statute of limitation to the Catawbas in precisely the same fashion as it applies to others." (Pet. 10) (emphasis in original).[8] In order to contrive this "failure to follow the mandate" issue, the petition not only misrepresents dictum in the opinion below as a holding, but inserts petitioners' own words into quotations of the Court of Appeals so as to distort and mislead.

The following quote is characterized in the petition as the "linchpin" holding of the Court of Appeals:

> [Application of the statute of limitation to the plaintiffs' claim] conflicts with the policy of the United

---

[8] This argument is premised upon petitioners' characterization of Indian title as an estate foreign to those recognized and protected by state law – so foreign that the rules that would apply to "any other person or citizen" under South Carolina law should not apply to the Tribe. Petitioners apparently do not deny that any other person or citizen would, under South Carolina law, be permitted to avail themselves of the state's "anti-tacking" rule. (Pet. 6, n.5). But under petitioners' view the Tribe, because it possesses Indian title, should be denied the benefit of the presumption of possession that would be accorded to any other citizen of the State. The Tribe's Indian title cannot, however, be relegated to a lesser stature and denied the benefit of a presumption that would be available to other citizens. This Court held that the 1959 Act's only effect on this claim was to impose on the Tribe "an obligation to proceed to assert its claim in a timely manner as would any other person or citizen of the State." *South Carolina v. Catawba Indian Tribe,* 476 U.S. at 510 (A. 68). The Court of Appeals followed this Court's mandate and applied the state statutes of limitations to the Tribe "in precisely the same fashion that they apply to others." *Id.* at 506 (A. 63).

> States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust.

(Pet. 10-11) (brackets by petitioners). The words actually used by the Court of Appeals are quite different:

> The argument that the Catawbas have equitable title precluding the tribe from invoking the presumption afforded by section 15-67-210 conflicts with the policy of the United States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust. Serious issues involving the application of the Supremacy Clause and the Equal Protection Clause would arise if a state in violation of the Nonintercourse Act were to dispossess a tribe and then defeat a tribe's legal claim to possession by denominating its title as equitable. Fortunately, we need not address these constitutional issues because we have no doubt that the Supreme Court of South Carolina, taking cognizance of the federal precedents and its own precedents, would hold that section 15-67-210 entitles the tribe to the presumption of possession.

Catawba Indian Tribe v. South Carolina, 865 F.2d at 1451-52 (A. 15).

The words that petitioners substitute for those actually used by the Court of Appeals – "[Application of the statute of limitations to the plaintiff's claim]" – are of course the very essence of this Court's mandate in this case. But that is not what the Court of Appeals said would conflict with federal Indian policy. Rather, what

the court below said would conflict with federal Indian policy was petitioners' own "argument that the Catawbas have equitable title precluding the Tribe from invoking the presumption of possession afforded by section 15-67-210."

After reworking the court's language to suit their argument, petitioners then erroneously characterize the "quote" as the opinion's central holding. (Pet. 11). However, the portion of the paragraph "quoted" in the petition does not constitute the court's holding. It is dictum contained in the court's short analysis of constitutional issues that it does not reach. The actual holding, which the petition fails to quote, is contained in the last sentence of the paragraph. There the Court of Appeals makes it quite clear that its holding is based on state law, *i.e.*, its certainty that the South Carolina Supreme Court would follow the state law precedents discussed in part III of the opinion together with the consistent federal precedents discussed in part IV of the opinion.

This Court's prior ruling in this case was that application of the statute of limitations to plaintiff's claim *would not* conflict with the policy of the United States and the Nonintercourse Act. By substituting their own words for those of the Court of Appeals and then mischaracterizing those words as the court's linchpin holding, petitioners have represented that the Court of Appeals applied a standard and reached a result that is contrary to that mandated by this Court.

But the Court of Appeals did follow this Court's mandate. Any fair reading of its opinion shows that state

law forms the basis of the court's holdings. It conscientiously applied the state statute of limitations to the Tribe's claim. On remand, the Court of Appeals required the parties to submit two additional rounds of briefs and held two additional *en banc* arguments. It attempted to certify the state law questions to the South Carolina Supreme Court. And it was certainly mindful of this Court's mandate:

> [T]he Supreme Court has definitively decided the effect that Congress intended the Catawba Act to have on the tribe's claim. On this issue its decision is final. We are not at liberty to attribute to Congress a different intention in order to question jurisdiction. The Supreme Court has issued its mandate directing us to decide the issue pertaining to the state statute of limitations. *See* 476 U.S. at 511. Sound principles of appellate procedure counsel compliance with the Court's mandate. *See* Skillern's Ex'rs v. May's Ex'rs, 10 U.S. (6 Cranch) 267 (1810).

Catawba Indian Tribe v. South Carolina, 865 F.2d at 1456 (A. 26).

Petitioner's effort to manufacture an issue worthy of this Court's review is an obvious attempt to circumvent this Court's practice of "generally accord[ing] great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. Cincinnati*, 475 U.S. 469, 484, n.13 (1986); *See Propper v. Clark*, 337 U.S. 472, 486-487 (1949); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500, n.9 (1985).

B. The Court of Appeals Correctly Decided the State Law Issue: While South Carolina's 10-Year Statute does not Permit Tacking, the State's Policies of Stability and Repose are Satisfied by an Overall Limitations Scheme that Includes a 20-Year Presumption of Grant and 40-Year Statute of Repose Under Both of which Tacking is Permitted.

1. Because the Tribe's Claim was Filed Before the 20-Year Common Law Presumption of Grant Became Applicable (18 Years After the Statute of Limitations Began to Run), Only Those Defendants Who Can Prove 10 Years' Adverse Possession Without Tacking May Prevail Against the Tribe.

Petitioners argue that the Court of Appeals decision undermines the state policy of fostering stability and repose through foreclosing untimely claims. This argument, however, conveniently ignores the existence of the state's 20 and 40 year limitations periods under which tacking is permitted. Examination of the overall state scheme shows that a claim filed 18 years after the limitations period began to run is not necessarily regarded as untimely. South Carolina has seen fit, through its "anti-tacking" rule, to give the true owner of land a greater measure of protection against adverse claimants.[9]

---

[9] The applicable South Carolina statutes are S.C. Code Ann. §§ 15-3-340 and 15-67-210 (Law. Co-op. 1976):

> § 15-3-340. First and second actions by individual for recovery of land.
>
> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained

(Continued on following page)

In applying South Carolina's 10-year statute of limitations to the Tribe's claim, the status of the parties and the title they asserted as of July 1, 1962, must be considered. On that date, the state statute of limitations commenced to run against the Tribe. *South Carolina v. Catawba Indian Tribe*, 476 U.S. at 510 (A. 68). It is assumed that the Tribe possessed valid Indian title to the land as of that date, *Id.* at 500 (A. 57), and that the 1959 Act had no direct effect on the Tribe's Indian title. *Id.* at 510 (A. 68). Therefore, for purposes of petitioners' summary judgment motion, as of 1962 the Catawba Tribe is assumed to have had full possessory rights in the subject lands and petitioners or their predecessors are assumed to have been trespassers.

However, even though petitioners or their predecessors had no legal claim to the land in 1962, they were in possession; and South Carolina, like other states, permits possessors of land to defeat the landowner's legal

---

(Continued from previous page)

unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

§ 15-67-210. Presumption of possession; when occupation deemed under legal title.

In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

title by showing actual possession or use adverse to that of the landowner. Unlike other states, however, South Carolina does not permit adverse occupants to unite or tack successive periods of possession in order to establish title pursuant to a statute of limitations. While unique, this "anti-tacking" rule applies only to the shortest of South Carolina's three adverse possession periods – its 10-year statute of limitations. Tacking successive periods of possession is permitted under South Carolina's 20-year common law presumption of grant and under its 40-year statute of repose. But because this suit was filed 18 years after the state statute of limitations became applicable, the 20-year common law presumption of grant and the 40-year statute of limitations are not at issue.

Under South Carolina's 10-year statute, once "legal title" has been shown, occupation of the premises by someone else is presumed to be permissive and the legal title holder is therefore presumed to have had possession within the ten years. By the explicit terms of the statute, anyone wishing to defeat legal title must show that their occupation was not permissive and that it lasted for 10 continuous years, except in the case of intestate succession.[10] The rationale underlying this rule lies in the characterization of the initial possession as tortious from its

---

[10] This rule prohibiting tacking of successive periods of possession under the 10-year statute was succinctly stated by South Carolina's foremost commentator on property law:

(Continued on following page)

inception. From this it follows that the trespasser has no valid legal interest to convey until the 10-year statutory period has run.[11]

South Carolina's "anti-tacking" statute has been the subject of frequent judicial construction over the course of more than a century. A long and unbroken line of South Carolina Supreme Court decisions demonstrates a tenacious adherence to the rule that successive periods of adverse possession may not be tacked to achieve the 10-year period of limitations contained in S.C. Code Ann.

(Continued from previous page)

> The rule in this State, contrary to the view of the overwhelming majority of jurisdictions, is that even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations. Such tacking has been permitted, however, in the case of a continuation by the heir of the possession of the ancestor dying intestate.

D. Means, *Survey of Property Law*, 10 S.C.L.Q. 90 (Fall 1958). Professor Means also states that if the adverse claimant is asserting title under the twenty year common law presumption of grant or the forty-year statute, tacking is permitted.

[11] The contrasting rationale that permits tacking under the 20-year common law presumption of grant lies in the presumption that the original entry was rightful from its inception. *See* Note, Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statute of Limitation, Presumption of a Grant, and Prescriptive Right in South Carolina, 10 S.C.L.Q. 292, 298 (Winter 1958).

§ 15-3-340.[12] The bar of the 10-year statute of limitations may not be invoked without proof of continuous adverse possession for ten years.[13] The South Carolina cases also make it clear that the 10-year statute of limitations must be asserted as an affirmative defense by each defendant. Assertion of the bar contained in S.C. Code Ann. § 15-3-340 requires "proof of actual, open, notorious, hostile, continuous and exclusive possession . . . ."[14]

---

[12] *E.g.*, Crotwell v. Whitney, 229 S.C. 213, 220-21, 92 S.E.2d 473, 477 (1956); Adams v. Adams, 220 S.C. 131, 66 S.E.2d 809 (1951); Ellen v. Ellen, 16 S.C. 132 (1881); Love v. Turner, 71 S.C. 322, 51 S.E. 101 (1905); Haithcock v. Haithcock, 123 S.C. 61, 68, 115 S.E. 727, 729 (1923); Epperson v. Stansill, 64 S.C. 485, 42 S.E. 426, 427 (1902); Burnett v. Crawford, 50 S.C. 161, 27 S.E. 645, 647 (1897); Garrett v. Weinberg, 48 S.C. 28, 26 S.E. 3, 18 (1896).

[13] Adams v. Adams, 220 S.C. 131, 66 S.E.2d 809, 812 (1951), ("no one can interpose this bar except as may have held for the period prescribed by the statute."), *quoting* Ellen v. Ellen, 16 S.C. 132, 141 (1881); Sutton v. Clark, 59 S.C. 440, 38 S.E. 150, 156 (1901) ("[t]he length of time necessary to bar the plaintiff's right of recovery and confer title on the defendant [through adverse possession] is the same in each case."); Love v. Turner, 71 S.C. 322, 51 S.E. 101, 104 (1905).

[14] Crotwell v. Whitney, 229 S.C. 213, 220-21, 92 S.E.2d 473, 477 (1956); Gregg v. Moore, 226 S.C. 366, 371, 85 S.E.2d 279, 281 (1954); Stokes v. Murray, 102 S.C. 395, 87 S.E. 71, 72 (1915); Lewis V. Pope, 86 S.C. 285, 68 S.E. 680, 683-84 (1910).

2. *Predecessors of the South Carolina Supreme Court Have Recognized Both Indian Title and a Reservation Granted by the Crown to be Enforceable at Law and Superior to Subsequent Grants from the State: No South Carolina Cases Hold that "Legal Title" is Restricted to "Record Title."*

Petitioners argue that because the Tribe does not have a garden-variety "record title," it does not have legal title under S.C. Code Ann § 15-67-210. South Carolina law is clear, however, that both Indian title and the title created by a reservation by the Crown are enforceable titles at law, superior to ordinary grants and paper title, that will support recovery on their own strength. The South Carolina Supreme Court's predecessor has recognized Indian title as a legally enforceable estate superior to a subsequent grant from the state. *Thomas v. Daniel*, 13 S.C.L. (2 McCord) 354 (1823), held that a grant of Cherokee Indian lands, where the title had not been extinguished, as "void." *Id.* at 359.[15]

---

[15] South Carolina statutory law also recognizes Catawba Indian title as a legal title. An 1808 statute, S.C. Code Ann. § 27-15-10 (Law. Co-op. 1976), provides:

> § 27-15-10. Catawba Indians may lease their lands.
>
> It shall be lawful for the Catawba Indians to grant and make to any person any lease or leases, for life or lives or term of years, of any of *the lands vested in them by the laws of this state; provided*, that no lease shall exceed the term of ninety-nine years or three lives in being.

(emphasis added). This statute, taken together with S.C. Code Ann. § 27-15-30 (Law. Co-op. 1976) which conveyed the State's

(Continued on following page)

In *Hawkins' Devisees v. Arthur*, 2 S.C.L. (2 Bay) 195 (1798), the Superior Court of Law considered in detail the nature of the title created by a reservation of lands by the Crown. In 1730, King George II by royal proclamation had offered "bounties of land" to induce settlement in upper South Carolina. A town was laid out, reserved for its inhabitants forever, surveyed and finally settled. The plat of survey was entered in the council books in 1732. Defendants claimed under the reservation and proclamation of 1730, their evidence of title being the plat of survey entered in the council books. Plaintiffs claimed the same land under "regular conveyances" going back to a grant from the colony in 1770, and objected to introduction of the plat of survey because it was not a grant, deed or conveyance.

In overruling plaintiffs' objection, the court explained that where the Crown reserved lands for public purposes and remained as trustee, there would never be any grant or deed evidencing title as there would be in the case of grants to individuals. The court found this lack of deeds and conveyances deducing a "clear and regular title down from the original grantee [the State]," *id.* at 196, to be no impediment to enforcing the reservation of lands

---

(Continued from previous page)

reversionary rights in the Tribe's lands to non-Indian lessees of the Tribe and acknowledged that the plat of the reservation was filed with the Secretary of State, demonstrates that South Carolina recognized the Indians' title as a legal title under state law. Moreover, these statutes' descriptions of the respective titles of the Indians and the State are perfectly consistent with the nature of Indian title under federal law, *see* part II, *infra*, where Indian title is recognized at law and the federal or state governments, or their grantees, hold the reversionary interest, or underlying fee.

by the Crown against the holder of a regular paper title tracing back to a subsequent grant from the State.

Notwithstanding that the crown and the state as its successor held the reservation in trust for those persons who had a right of occupancy, the court held:

> As to the legal effect of this reservation, there could be no question about it. It amounted to a covenant in law, between the crown and the people, for whose use and benefit it was intended; that the land contained within the boundaries of that plat, should for ever thereafter be appropriated and disposed of, for the use and benefit of the inhabitants of the said town and township, and their heirs for ever, and to and for no other intent and purpose whatsoever.

2 S.C.L. (2 Bay) at 203.

Hawkins' Devisees establishes that under South Carolina law the title created by a reservation for a public purpose by the Crown is binding upon the State as the Crown's successor,[16] and is superior to and enforceable at law against an ordinary paper title. *Hawkins' Devisees* further establishes that the title to a reservation would never be a "record title" within the scope of operation of the state's system of land registration. Because "there was never any grant or deed to produce, the only evidence of such reservation is a copy of the plat entered in the council books." *Id.* at 198.

---

[16] *See* Chisolm v. Caines, 67 F. 285, 287 (1894) holding that "the State of South Carolina succeeded to the obligation as well as the rights of the crown. She became, upon the Revolution, the owner of lands not granted by her predecessor. She is bound by these grants"; *citing* State v. Pacific Guano Company, 22 S.C. 50, 74 (1884); *see also* State Ex Rel. McLeod v. Sloan Const. Co., 284 S.C. 491, 328 S.E.2d 84 (S.C. App. 1985); Moore v. McClure, 4 S.C.L. 139 (1807).

The procedure described in *Hawkins' Devisees* for establishment of a reservation was followed by the Crown in the case of the Catawba Reservation.[17] It was created by the Crown for a public purpose pursuant to a royal proclamation. Following establishment of the Reservation, the Crown remained as trustee, and the plat of survey was filed with the Colony of South Carolina. S.C. Code Ann. § 27-15-30.

The holdings in *Hawkins' Devisees* and *Thomas v. Daniel* demonstrate clearly that under South Carolina law Indian title is enforceable at law, with no recording requirement, and is superior to ordinary deeds and conveyances tracing back to a grant from the state.

In addition to the South Carolina cases recognizing Indian title and reservation title as enforceable at law, the Court of Appeals relied on more current South Carolina law recognizing and enforcing titles without requiring recordation. *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923) recognized that legal title may be established in any one of four ways, including adverse possession, and applied the statutory presumption relied on by the tribe without requiring proof of recordation or registry. Indeed, as the Court of Appeals points out, "the state has cited no case holding that proof of recording in the Registry of Mesne Conveyances is necessary in order to establish legal title within the meaning of section 15-67-210." *Catawba Indian Tribe v. South Carolina*, 865 F.2d at 1449 (A. 11). The court further noted that this lack of precedent

---

[17] *See* Appeals Court Appendix at 105, 111, 136-37, 130-40; Complaint ¶¶ 12, 13, 14 and Attachment A.

was not surprising because "recording becomes material only when there are double conveyances by the same person, or where there are subsequent creditors." *Id. (quoting First Carolina Joint Stock Land Bank v. Hudgens,* 171 S.C. 18, 21, 171 S.E. 449, 451 (1933)).

The cases cited by petitioners in support of their notion that legal title can only be record title stand for no more than the proposition that the record may be and often is reflective of the legal title. Their argument also fails to account for title by adverse possession and passage of title by descent, where legal title is unquestionably not the same as record title. *See Sutton v. Clark* 59 S.C. 440, 38 S.E. 150 (1901); *Scott v. Woodard,* 2 McCord 161 (S.C. 1822); *Delleney v. Winnsboro Granite Co.,* 72 S.C. 39, 51 S.E. 531 (1905).

These state law authorities compel the conclusion that legal title under South Carolina law is not restricted to record title and that the South Carolina Supreme Court would recognize Indian title as legal title under section 15-67-210. Having shown legal title as of the date the statute of limitations became applicable, petitioners' possession is presumed to be in subordination to the legal title. This presumption must be rebutted by showing 10 years' uninterrupted adverse possession.

The Court of Appeals carefully applied the South Carolina statute of limitations to the Tribe's claim. This Court's general practice has been to accord such state law determinations "great deference." *Pembaur v. Cincinnati,* 475 U.S. at 484, n.13. Unless the lower court's determination is "clearly wrong," *The Tungus v. Skovgaard,* 358 U.S. 588, 596 (1959); "clearly erroneous," *United States v.*

Durham Lumber Co., 363 U.S. 522, 527 (1960); or "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-487 (1949), this Court has upheld lower courts' interpretations of state law. Here, the Court of Appeals' interpretation of state law is clearly correct. Adoption of petitioners' views would require this Court to revise the comprehensive state law scheme applied by the Court of Appeals and rewrite South Carolina law in a manner that the State legislature has never seen fit to do, *i.e.*, restrict "legal title" to "record title."

II. The Court Of Appeals Correctly Held That Under Federal Law, Indian Title Is Legal Title.

Petitioners argue that Indian title is not "actual title," rather, it is a mere right of occupancy that "does not constitute a property right at all." (Pet. 15). Therefore, "legal title" to the property is possessed by petitioners because they possess the underlying fee.

Petitioners seriously misapprehend the nature and status of Indian title. As noted by the Court of Appeals, a long line of decisions by this Court conclusively establishes that the title of Indian tribes to land is "as sacred and securely safeguarded as is fee simple absolute title." *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938); *accord Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 669 (1974) *(Oneida I); Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235 (1985) *(Oneida II); United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

This principle applies whether a tribe holds title pursuant to sovereign action, or pursuant to aboriginal use

and occupancy. *Oneida I*, 414 U.S. at 669-70; *see generally*, F. Cohen, *Handbook of Federal Indian Law*, 471-99 (1982 ed.). The Catawba Tribe asserts title under a 1763 treaty with the Crown. In *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1833), this Court established that the right of Indian tribes derived from treaties with a prior government are recognized as valid and enforceable under federal law. *Id.* at 755-56; *accord Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587-88 (1823) ("The validity of titles given by [prior governments] has never been questioned in our courts").

The title asserted by the Tribe in this case is recognized Indian title that is protected by the Fifth Amendment to the United States Constitution. Even as against the United States, it is a property right that cannot be extinguished without the payment of just compensation.[18] *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); and *see generally*, F. Cohen, *Handbook*, *supra* at 217-18, 485-86.

---

[18] Petitioners fail to grasp the distinction between recognized Indian title and aboriginal Indian title, basing their mistaken notions about the nature of Indian title on selected quotes from cases discussing the nature of aboriginal rights as against the United States. *See*, F. Cohen, *Handbook*, *supra* at 488. This case, of course, concerns the nature of *recognized* Indian title as against third parties. As against the United States, aboriginal property rights are deemed not entitled to compensation on the theory that Congress has not sufficiently envinced an intent to recognize such rights on a permanent basis. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-79 (1955) (aboriginal Indian title); Sioux Tribe v. United States, 316 U.S. 317, 331 (1942) (Executive Order title). The Catawba Tribe's title, however is recognized title because it is derived from a treaty with the Crown which is adopted as federal law.

Moreover, Indian title confers on Indian tribes "the 'unquestioned right' . . . to the exclusive possession of their lands." *Oneida II*, 470 U.S. at 235, *quoting Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Hence, Indian title, whether aboriginal or recognized, confers the power to bring possessory actions against third parties for ejectment and/or damages. *See Oneida II*, 470 U.S. at 235-236; and *see generally*, F. Cohen, *Handbook, supra* at 524, 526-28. In *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), this Court held that a railroad was liable for trespass damages arising out of the railroad's illegal use of tribal land held by aboriginal title.

In contrast, the "fee" underlying Indian title held by the United States, or by states which comprise the original thirteen American colonies, or by grantees of these governments, does not confer present possessory rights in lands subject to Indian title. The "fee" holder is thus not empowered to interfere with the right of Indian tribes to exclusive possession, unless Congress has clearly indicated an intent to extinguish such tribal rights. *See, e.g., Wisconsin v. Hitchcock*, 201 U.S. 202 (1906); *Beecher v. Wetherby*, 95 U.S. 517 (1877); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 344-47, 353-54 (1941); *Buttz v. Northern Pacific R.R. Co.*, 119 U.S. 55, 66 (1886). Hence, unless Congress has extinguished those tribal rights, conveyance of the "fee" underlying Indian title by the federal government or by states does not convey the tribe's exclusive and permanent possessory rights in the claimed land. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 344-45; *Oneida II*, 470 U.S. 229-34.

These principles were summarized in Cohen's Handbook of Federal Indian Law:

> The Supreme Court has held that this underlying fee simple title to land subject to original Indian title can be conveyed by the holder of the fee subject to the Indian right of occupancy. And, as the Court observed in *Johnson*, unless Indian title to the land has been extinguished, any grant of the lands, even by the United States, is subject to original Indian title and does not extinguish or interfere with the Indian right of occupancy. The naked fee title in land subject to original Indian title gives the holder, whether the state or a private party, no present possessory interest in the land. Naked fee title merely constitutes a reversionary interest that becomes possessory only if Congress clearly and plainly extinguishes the Indian title.

F. Cohen, *Handbook, supra* at 489 (footnotes omitted).

Thus, any fee simple estate claimed by the State of South Carolina and its grantees is predicted only on such a reversionary interest. The State and its successors will have no rights in the property until such time as the rights of the Tribe have been extinguished with the consent of Congress.[19]

Petitioners' argument that Indian title is no title at all is premised on a misinterpretation of selected discussions contained in cases relating to the nature of aboriginal

---

[19] Under South Carolina law, such a possibility of reverter is not an estate, "[f]or it has nothing like an estate about it. It is neither a present nor future right. It is a mere possibility. . . ." Adams v. Chaplin, 10 S.C. (1 Hill) Eq. 265, 277 (1833). Conversely, South Carolina law recognizes that "a possession which shall be deemed valid against the world is tantamount to the fee." Sutton v. Clark, 59 S.C. 440, 38 S.E. 150, 156 (1901)

Indian title vis-a-vis the United States. As pointed out in Cohen's *Handbook*, however, the argument "that aboriginal title vests no rights in an Indian Tribe" has never been accepted. *Id.* at 488. While *Johnson v. M'Intosh* held that aboriginal Indian title may not be conveyed by tribes to third parties, it did not consider the nature of recognized Indian title nor did it consider whether aboriginal title was an enforceable property right against third parties. As Cohen concludes: "The fact that tribes are entitled to receive trespass damages for illegal use of their lands by third persons implies that Indian title represents a perpetual right of use and occupancy (until extinguished) virtually equivalent to a fee interest against all but the United States." *Id.* at 488-89.

The Court of Appeals correctly held that with respect to any defendant other than the United States, Indian title and fee simple absolute title are virtually indistinguishable. Indian title is legal title under federal law.

III. Review At This Time Would Be Premature: The Complaint Has Not Been Answered And A Defendant Class Has Not Been Certified.

This appeal is interlocutory; a defendant class has not been certified and no answers to the complaint have been filed. While petitioners allege importance of this case to the affected landowners, no record has been developed of any economic disruption or hardship caused by this claim to date. Should the Tribe prevail on liability issues, it is likely that a federal court would fashion a remedy that

would take into account the "impossibility" of repossession. *Catawba Indian Tribe v. State of South Carolina*, 740 F.2d 305, 307 (4th Cir. 1984) (Murnaghan, J. concurring); *see Oneida II*, 470 U.S. at 253, n. 27.

IV. Petitioners' Exaggerated Fears Of Hardship Resulting From The Lower Court's Ruling Are Unfounded Because Congress Will Certainly Resolve This Claim If It Proceeds To The Merits.

In recent years Congress has been active in resolving major Indian land claims by implementing consensual settlement agreements.[20] These legislative settlements have been facilitated by lower federal court rulings that struck down preliminary defenses and affirmed the legitimacy of the tribal claims.[21] Indeed, the legislative history of each Eastern Indian land claim settlement act attributes the need for the legislation to the perceived credibility of the tribal claim.[22] The recent experience of the

---

[20] *See, e.g.*, Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. § 1701 (1982); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1721 (1982); 1983 Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1751.

[21] *See* Narrangansett Tribe of Indians v. So. R.I. Land Devel. Corp., 418 F.Supp. 798 (D.R.I. 1976); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F.Supp. 780 (D.Conn. 1976).

[22] *See* H.R. Rep. No. 95-1453, 95th Cong., 2d Sess. 7-9, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1948; H.R. Rep. No. 96-1353, 96th Cong., 2d Sess. 12-13, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3786; S. Rep. No. 98-222, 98th Cong., 1st Sess. 7-8.

Catawba Tribe demonstrates that its claim, like those of other Eastern Indian tribes, cannot be fairly settled without benefit of judicial interpretation.[23] Should the case now proceed to the merits, settlement efforts will resume and this claim will be resolved by Congress as have other Eastern Indian land claims.

---

[23] In 1976, in an effort to establish the credibility of the tribal claim without resorting to litigation, the Tribe renewed its 1908 request to the United States to initiate litigation on its behalf to recover the Treaty Reservation. One year later the Solicitor of the Department of the Interior concluded that the Tribe could establish a prima facie Nonintercourse Act claim and formally requested the Department of Justice to initiate legal action – but only in the event that efforts already underway to reach "an amicable, orderly settlement" should fail. Appendix to Respondent Tribe's Brief in Opposition to Petition for Certiorari (1985), Exhibit B, p.3a. Thereafter, two tribal settlement initiatives, resulting in detailed settlement proposals very similar to those enacted by Congress for other Eastern Indian tribes, *see* n. 20, *supra*, were rejected. Hearings on H.R. 3274, Hse. Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 30-36, June 12, 1979; Hearings on H.R. 5494, Hse. Comm. on Interior and Insular Affairs, 97th Cong., 2d Sess., June 22, 1982 (unpublished).

CONCLUSION

The Court of Appeals followed this Court's mandate and correctly applied the South Carolina statute of limitations to the Tribe's claim. The petition should be denied.

Respectfully submitted:

DON B. MILLER
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JAY BENDER
BELSER, BAKER, BARWICK,
RAVENEL & BENDER
1730 Main Street
Columbia, SC 29202
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2998

RICHARD STEELE
113 W. Main Street
Union, SC 29379
(803) 427-5237

Attorneys for Respondent
Catawba Tribe